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COMMERCIAL TORTS AND DECEPTIVE TRADE PRACTICES

by

Lyman G. Hughes* and Tim Gavin**

I. COMPETITIVE PRACTICES

A. Antitrust

THE first case under the Texas Free Enterprise and Antitrust Act of 1983 (TFEAA)¹ to reach the appellate courts was reported during the survey period. In *State v. Coca Cola Bottling Co.*² the state sought to divest a bottling company of assets purchased from another bottling company. In the trial court the defendants urged by special exceptions that the TFEAA violated the supremacy³ and commerce⁴ clauses of the United States Constitution. The trial court sustained the exceptions.

On appeal the court first considered the argument that the supremacy clause preempted the TFEAA because the merger and acquisition restrictions of the Act conflict with the Clayton Act⁵ and the Soft Drink Interbrand Competition Act.⁶ The court held that although the state statute may have incidental effects on interstate commerce, if the statute is regulated evenhandedly to effectuate a legitimate local interest, the supremacy clause will not preempt the statute.⁷ The court further held that the TFEAA met this test.⁸ The court then noted that both the Soft Drink Act and the TFEAA look to the same question of whether the product involved is in effective competition with other products of the same general class in the relevant geographic market. The court thus held that the statute does not conflict with either the Clayton Act or the Soft Drink Act and accordingly concluded that the supremacy clause did not render the TFEAA

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1. TEX. BUS. & COM. CODE ANN. §§ 15.01-17.826 (Vernon Supp. 1986).

2. 697 S.W.2d 677 (Tex. App.—San Antonio 1985, no writ).

3. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

4. The Constitution grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

5. 15 U.S.C. § 18 (1983).

6. *Id.* §§ 3501-3503.

7. 697 S.W.2d at 680.

8. *Id.*

unconstitutional.⁹

The court similarly rejected the defendants' arguments that the TFEAA violates the commerce clause because it affects interstate commerce. The court held that absent a specific showing of a clearly excessive burden on interstate commerce or a demonstrable effect on the interstate flow of goods, the court could only conclude that the TFEAA "has a rational relationship to a legitimate State interest, i.e., the maintenance and promotion of economic competition in trade and commerce occurring wholly or partly within the state."¹⁰ The court concluded that no showing of an excessive burden on interstate commerce existed in the present case and, therefore, that the trial court had erroneously held the TFEAA unconstitutional.¹¹

The constitutional issues presented in the *Coca Cola Bottling* case will arise frequently in cases involving claims under the TFEAA. Accordingly, the court's opinion is an important one and merits a close look. Two points seem particularly noteworthy. First, two of the three judges on the panel that decided *Coca Cola Bottling* joined in the concurring opinion of Judge Cadena,¹² which urged that because the TFEAA is not unconstitutional on its face, the court should make no "sweeping declarations concerning the validity of the statute in the absence of evidence establishing the effect of the challenged transaction as applied to the facts of this case."¹³ Consequently, the majority of the panel supported the reversal of the trial court judgment on the sole ground that the determination of the constitutional issues should be made upon an evidentiary record rather than upon special exceptions.

Second, the court's reasoning with respect to whether the TFEAA is preempted by the Soft Drink Act is perhaps unsound. That Act expressly preempts the antitrust laws with respect to transactions to which the Act applies.¹⁴ The antitrust laws include the Sherman Act,¹⁵ the Clayton Act,¹⁶ and the Federal Trade Commission Act.¹⁷ Since the legislature expressly intended the TFEAA to mirror these federal acts,¹⁸ the conclusion more properly should be that the Soft Drink Act also preempts the TFEAA. More broadly speaking, whenever Congress has expressly preempted the fed-

9. *Id.* at 681.

10. *Id.* at 682.

11. *Id.* The court did not discuss § 15.25(b) of the TFEAA, which appears to be an attempt by the legislature to address the constitutional issue. That section provides:

No suit under this Act shall be barred on the grounds that the activity or conduct complained of in any way affects or involves interstate or foreign commerce. It is the intent of the legislature to exercise its powers to the full extent consistent with the constitutions of the State of Texas and the United States.

TEX. BUS. & COM. CODE ANN. § 15.25(b) (Vernon Supp. 1986). The constitutional issue is not a subject for the legislature, however, and the legislature should never have included this section in the TFEAA. The court properly ignored § 15.25(b) in *Coca Cola Bottling*.

12. 697 S.W.2d at 683.

13. *Id.*

14. 15 U.S.C. § 3501 (Vernon 1983).

15. *Id.* §§ 1-11.

16. *Id.* §§ 12-31.

17. *Id.* §§ 41-58.

18. TEX. BUS. & COM. CODE ANN. § 15.04 (Vernon Supp. 1986).

eral antitrust laws, the courts should also find the TFEAA impliedly preempted.

B. Trade Names and Trade Secrets

The extent of protection provided to a trade name was the focus of the Fifth Circuit decision in *Conan Properties, Inc. v. Conans Pizza, Inc.*¹⁹ Like all cases of this nature, the particular facts of the case determined its outcome. Nevertheless, the Fifth Circuit opinion merits review for its discussion of the effect of laches²⁰ as well as its consideration of secondary meaning.²¹

Although the appellate court modified and affirmed a temporary injunction in *Keystone Life Insurance Co. v. Marketing Management, Inc.*,²² the court declined to address a significant question concerning the protection accorded to customer lists provided by one party to another when the two parties engage in a common enterprise. The agreement between the parties contained no restriction on the use of information provided by one party to the other, and the agreement defined both parties as independent contractors. The defendant accordingly argued that the plaintiff could show no probable right of recovery based on the defendant's use of the plaintiff's customer list after the termination of the common enterprise. The plaintiff argued that the defendant's action in using the customer information was a breach of the good faith required in the performance of the contract. More importantly, the plaintiff argued that recovery for misappropriation of confidential information does not depend upon contractually imposed duties or upon an express confidential relationship, but rather that the right of recovery flows from the mere fact that a confidence has been extended.

The appellate court passed this "difficult question" back to the trial court for initial determination, but found a sufficient showing of at least a "probable right of recovery" to support the issuance of a temporary injunction.²³ The dissent would find no showing of a probable right of recovery for the use of a customer list where there existed no contractual limitations on the parties, no confidential relationship between the parties, no evidence that the customer list was treated as confidential, and no evidence that the plaintiff had directed the defendant to maintain the list as confidential.²⁴

II. DECEPTIVE TRADE PRACTICES

A. Definition of Consumer

Numerous decisions of the Texas Supreme Court and various courts of appeals addressed the issue of who qualifies as a consumer with standing to

19. 752 F.2d 145 (5th Cir. 1985).

20. Laches or acquiescence in the use of the trade name in one location would not preclude injunctive relief against use of the name in another locale. *Id.* at 152-53.

21. *Id.* at 155.

22. 687 S.W.2d 89 (Tex. App.—Dallas 1985, no writ).

23. *Id.* at 92.

24. *Id.* at 94 (Guillot, J., dissenting).

bring suit under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).²⁵ Four years ago in *Cameron v. Terrell & Garrett, Inc.*²⁶ the Texas Supreme Court established the general principles applicable in determining whether a party qualifies as a consumer. In that case the court established a two-prong test. First, the party must seek or acquire, by purchase or lease, goods or services.²⁷ Second, the goods or services sought or acquired by lease or purchase must form the basis of the party's complaint.²⁸

In *Chastain v. Koonce*²⁹ the Texas Supreme Court confirmed that *Cameron* provides the controlling test in determining consumer status, but the court had to stretch the second prong in order to find that the plaintiffs satisfied this test. The plaintiffs in *Chastain* purchased lots for the construction of personal residences. In so doing, the plaintiffs relied upon the sellers' representations that purchasers of the remaining lots in the tract would use the lots strictly for residential purposes. After the plaintiffs completed their purchases, the sellers conveyed one of the remaining lots to a third party, who built an oil field pipe storage yard on his lot. In determining whether the plaintiffs satisfied the elements of the *Cameron* test, the court had no difficulty in finding the first prong of the test satisfied.³⁰ The court had to be creative, however, to find that the plaintiffs fulfilled the second requirement. The plaintiffs had no complaint regarding the qualities of the lots they had purchased, but instead complained about the use made of a nearby lot. Nevertheless, the court concluded that the plaintiffs' complaint was related to a feature of the lots they obtained. The court noted that the defendants "made representations calculated to induce these purchasers to buy the lots and which enhanced the desirability of the property. Thus, the purchasers were complaining about an aspect of the lots purchased and the transaction involved."³¹ The court further buttressed its conclusion by citing the floor debate in the Texas Senate, wherein a speaker cited as a specific example of a DTPA violation a promise to erect a shopping center with no intent to follow through on the promise.³²

25. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1986).

26. 618 S.W.2d 535, 539 (Tex. 1981).

27. The first part basically restates verbatim the definition of consumer contained within the DTPA itself. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1986).

28. 618 S.W.2d at 539.

29. 29 Tex. Sup. Ct. J. 79 (Nov. 27, 1985).

30. *Id.* at 80.

31. *Id.* at 81. Similarly, in *William P. Terrell, Inc. v. Miller*, 697 S.W.2d 454 (Tex. App.—Beaumont 1985, no writ), the court stretched the second part of the *Cameron* test in order to find that the plaintiff had standing to pursue a DTPA claim. The plaintiffs in that case purchased a home from the defendant builder and brought suit, claiming that the builder had refused to pay for points and had refused to provide electrical fixtures at cost. The plaintiffs clearly had acquired a "good" in purchasing the home, but had no complaint regarding the home itself. Instead, the plaintiffs' complaint centered on these two collateral agreements allegedly made by the builder. Nevertheless, since these complaints pertained to the cost of the good purchased, the court correctly concluded that the plaintiffs had standing to bring a DTPA claim. *Id.* at 456-57.

32. Debate on Tex. S.B. 48 on the Floor of the Senate, 64th Leg. 3 (Feb. 10, 1975) (transcript available from Senate Staff Services office).

Justice Gonzales concurred in the overall result reached in the case,³³ but disagreed sharply with the majority's characterization of the plaintiffs as consumers with standing to sue under the DTPA. In his concurring opinion he noted that the plaintiffs did not have any rights in the lot used for oil field pipe storage, but instead had purchased totally distinct lots. As a result, he believed that the plaintiffs failed to show that the goods or services that they obtained formed the basis of their DTPA complaint, and he would have denied them standing to bring a DTPA claim.³⁴

The supreme court also addressed the consumer issue in *Kennedy v. Sale*,³⁵ a case brought by an employee covered under his employer's group insurance policy. A representative of the insurance carrier met with the plaintiff and other employees and explained the benefits available under the policy. The insurer's representative misrepresented the extent of the preexisting condition coverage, and the plaintiff claimed that had he been given correct information regarding the extent of this coverage, he would have enrolled under his wife's group plan, which provided full coverage. The court of appeals held that the employee was not a consumer because the employer alone had purchased the policy and the employee had merely received coverage as a benefit of employment.³⁶ The supreme court reversed, holding that the first prong of the *Cameron* test only requires that the plaintiff acquire goods or services and does not require that the plaintiff himself actually make the purchase.³⁷ The court held that the plaintiff acquired the policy benefits by purchase, albeit a purchase consummated for his benefit by his employer; consequently, the plaintiff satisfied the definition of a consumer.³⁸

*Fielder v. Able*³⁹ and *Aetna Casualty & Surety Co. v. Martin Surgical Co.*⁴⁰ provide good illustrations of correct and incorrect applications of the *Cameron* test. The plaintiff-sellers in *Fielder* brought suit against an attorney who represented a purchaser in a real estate transaction. The plaintiffs complained that the defendant attorney erroneously included a 75-foot strip of land within the warranty deed. The court of appeals reversed a jury verdict in favor of the plaintiffs on their DTPA claim, holding that they did not qualify as consumers.⁴¹ Since the defendant-attorney had not represented the plaintiffs in the transaction, the plaintiffs had neither sought nor acquired his services. The plaintiffs did acquire a title policy containing the inaccurate description, and they claimed that the purchase of the policy was the purchase of a service, which qualified the whole transaction as a con-

33. Although the court found that the plaintiffs had standing to pursue the DTPA claim, the court found no evidence of unconscionability. See discussion in text accompanying *infra* notes 95-96.

34. 29 Tex. Sup. Ct. J. at 83 (Gonzalez, J., concurring).

35. 689 S.W.2d 890 (Tex. 1985).

36. *Sale v. Kennedy*, 679 S.W.2d 733, 736 (Tex. App.—El Paso 1984).

37. 689 S.W.2d at 892.

38. *Id.*

39. 680 S.W.2d 655 (Tex. App.—Austin 1984, no writ).

40. 689 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

41. 680 S.W.2d at 658.

sumer transaction. The court correctly rejected this argument, noting that the issuance of the title policy was not the basis of the plaintiff's complaint.⁴² As a result, the plaintiffs could not satisfy the second prong of the *Cameron* test.

The plaintiff in *Aetna Casualty & Surety Co. v. Martin Surgical Co.*⁴³ had been one of four defendants in an earlier suit alleging the manufacture or sale of a defective drug. Martin Surgical had purchased this drug for resale from the manufacturer and accordingly was covered under a broad form vendor's endorsement in an insurance policy issued to the manufacturer by Aetna. Nevertheless, Aetna failed to provide Martin Surgical with a defense in the earlier lawsuit. As a result, Martin Surgical initiated this DTPA action seeking to recover its costs of defending the earlier suit from Aetna. Under the *Cameron* test the plaintiff should not have qualified as a consumer. The good or service forming the basis of the plaintiff's complaint was the insurance policy. The plaintiff neither sought nor acquired this policy, but instead was a third party beneficiary of a policy acquired by the manufacturer.⁴⁴ Nevertheless, the supreme court held that the plaintiff qualified as a consumer because the plaintiff purchased goods, in the form of the allegedly defective drugs, as a part of the transaction.⁴⁵ Since the allegedly defective drugs did not form the basis of the plaintiff's complaint against Aetna, the plaintiff failed to qualify as a consumer under the DTPA according to the *Cameron* test, an important point which the court failed to consider.

The court in *Northside Auto Storage v. Allstate Insurance Co.*⁴⁶ correctly concluded that the plaintiff did not qualify as a consumer under the *Cameron* test. The plaintiff claimed that the defendant auto storage company obtained possession of a stolen car, the rights to which belonged to the plaintiff.⁴⁷ The defendant had stored the car for some time prior to selling it to a third party. Although the court noted that the storage of the car could constitute a service, the plaintiff had not actually sought or acquired that service by purchase or lease. As a result, the plaintiff failed to qualify as a consumer with standing to pursue a DTPA claim.⁴⁸

Lenders continue to pose unique problems in determining whether a party qualifies as a consumer under the DTPA. Since money does not constitute either a good or a service, the supreme court has held that a party who seeks to obtain a loan from a bank or other lender does not ordinarily qualify as a consumer under the DTPA.⁴⁹ In *Flenniken v. Longview Bank & Trust Co.*⁵⁰

42. *Id.* at 657.

43. 689 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

44. This case is distinguishable from *Kennedy v. Sale*, discussed *supra* notes 35-36 and accompanying text, where the insurance company actually issued the policy to the employee, although the employer paid for the policy.

45. 689 S.W.2d at 267.

46. 684 S.W.2d 185 (Tex. App.—Houston [14th Dist.] 1984, no writ).

47. The plaintiff insurance company brought a subrogation action after paying its insured for the value of the stolen automobile. The court treated the company and the insured as identical parties for purposes of determining the consumer issue.

48. 684 S.W.2d at 187.

49. See *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980).

the supreme court held that a borrower may qualify as a consumer if the borrower intends to use the money for the purchase or lease of a good or service.⁵¹ In *First Texas Savings Association v. Stiff Properties*⁵² and *Irizarry v. Amarillo PanTex Federal Credit Union*⁵³ the courts of appeals applied the *Flenniken* analysis in order to find that the plaintiffs qualified as consumers. In *Stiff Properties* the plaintiff sought a loan from the defendant in order to purchase a condominium unit. The defendant failed to close the loan at the agreed time, however, and the plaintiff accordingly could not purchase the unit. The court held that since the plaintiff intended to purchase a good, namely the condominium, the plaintiff qualified as a consumer.⁵⁴ In so holding the court neglected to consider the second prong of the *Cameron* test. The plaintiff in *Stiff Properties* had no complaint regarding the condominium unit that was to be acquired; instead his sole complaint concerned the lender's failure to loan the money in a timely fashion. Consequently, the court should not have found that the plaintiff qualified as a consumer under the *Cameron* test.

Similarly, the plaintiff in *Irizarry* sought a loan to acquire an automobile. The plaintiff claimed that he borrowed the money from the defendant because the defendant represented to him that the defendant would pay the loan with the proceeds of an insurance policy carried by the defendant if the plaintiff became disabled. The plaintiff became disabled and found that the policy did not cover him. The trial court granted a summary judgment in favor of the defendant, refusing to find that the plaintiff was a consumer. The court of appeals reversed, holding that since the plaintiff had sought to purchase a car with the proceeds of the loan, he qualified as a consumer.⁵⁵ The plaintiffs did not have any complaint regarding the car itself, however. Thus, the court applied the wrong analysis. Nevertheless, the court reached the right result because the plaintiff had sought to acquire the disability coverage as a part of the transaction, and his specific complaint concerned this coverage. Consequently, the plaintiff met both parts of the *Cameron* test.

In *Reed v. Israel National Oil Co.*⁵⁶ the court held that the determination of the plaintiff's status as a consumer is a question of law for the trial court to determine on the basis of the evidence.⁵⁷ The court stated that if the trial court concludes as a matter of law that the plaintiff is not a consumer, then the trial court should not submit DTPA issues to the jury.⁵⁸

Finally, two separate courts of appeals held that a plaintiff does not have

50. 661 S.W.2d 705 (Tex. 1983); see Hughes, *Torts—Commercial, Annual Survey of Texas Law*, 38 Sw. L.J. 35, 41 (1984); Hughes & Gavin, *Commercial Torts and Deceptive Trade Practices, Annual Survey of Texas Law*, 39 Sw. L.J. 123, 133-34 (1985) [hereinafter cited as Hughes & Gavin, 1985 Annual Survey].

51. 661 S.W.2d at 707.

52. 685 S.W.2d 703 (Tex. App.—Corpus Christi 1984, no writ).

53. 695 S.W.2d 91 (Tex. App.—Amarillo 1985, no writ).

54. 685 S.W.2d at 706.

55. 695 S.W.2d at 93.

56. 681 S.W.2d 228 (Tex. App.—Houston [1st Dist.] 1984, no writ).

57. *Id.* at 233.

58. *Id.*

to part with any valuable consideration in order to qualify as a consumer. In both *Martin v. Lou Poliquin Enterprises, Inc.*⁵⁹ and *Reuben H. Donnelly Corp. v. McKinnon*⁶⁰ the plaintiffs pursued DTPA actions, complaining of the defendants' failure to place advertisements in the yellow page directory. The defendants in both cases claimed that the plaintiffs did not qualify as consumers because they had never been billed for the ads that had not appeared in the directory. Both courts rejected this argument, holding that a person qualifies as a consumer if he *seeks* to acquire goods or services, regardless of whether he actually purchases those services.⁶¹ The court in *Martin* established two prerequisites that must be satisfied before a plaintiff who does not part with any valuable consideration can qualify as a consumer. First, the plaintiff must present himself to the seller as a willing buyer with the subjective intent or specific objective of purchasing; secondly, the plaintiff must possess at least some credible indicia of the capacity to consummate the transaction.⁶² If a defendant challenges the plaintiff's status as a consumer, the plaintiff must then offer proof of his good faith intention to purchase and his capacity to purchase the goods or services in question.⁶³

B. Notice

In *Silva v. Porowski*⁶⁴ the court considered the adequacy of the notice of the consumer's complaint that the defendant received.⁶⁵ Despite the statutory requirement that a plaintiff include a statement of the amount of attorney's fees incurred to the date of the notice, the court held that a party willing to settle without receiving attorney's fees need not include any reference to attorney's fees within the notice.⁶⁶ Since at the time the defendant in *Silva* received the notice the plaintiff was willing to waive attorney's fees in

59. 696 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

60. 688 S.W.2d 612 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

61. *McKinnon*, 688 S.W.2d at 616; *Martin*, 696 S.W.2d at 185.

62. 696 S.W.2d at 184-85.

63. In reaching this conclusion, the court expressly overruled its earlier decision in *Bancroft v. Southwestern Bell Tel. Co.*, 616 S.W.2d 335 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ), which reached a contrary conclusion in a case involving nearly identical facts. The court based its decision to overrule *Bancroft* on three separate facts. First, both the legislature and the Texas Supreme Court have acknowledged that courts should liberally construe the DTPA to protect the public (*see* TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1986)); secondly, the statute itself indicates that the legislature contemplated actionable practices wherein a transfer of valuable consideration would not always take place (*see, e.g., id.* § 17.46(b)(10) (prohibiting advertising goods or services with intent not to supply a reasonably expectable public demand)); and thirdly, the supreme court has deemed a person's objective critical in determining his status as a consumer (citing *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 567 (Tex. 1984)). 696 S.W.2d at 183-84.

64. 695 S.W.2d 766 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

65. TEX. BUS. & COM. CODE ANN. § 17.50A (Vernon Supp. 1986) provides that as a prerequisite to filing a suit seeking damages under the DTPA, a consumer must give written notice of his claim to the person he proposes to sue at least thirty days before filing suit. This notice must advise the person of the consumer's specific complaint and the amount of actual damages and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim. *Id.*

66. 695 S.W.2d at 767-68.

settling the controversy, the court found the notice adequate.⁶⁷ The court further noted that the plaintiff bears the burden of pleading and proving the giving of notice in a DTPA case.⁶⁸ Nevertheless, if a defendant fails to specially except to a pleading that does not allege the giving of notice, the defendant waives this pleading defect.⁶⁹ In *Pool Co. v. Salt Grass Exploration, Inc.*⁷⁰ the court discussed the proper means of raising a plaintiff's failure to give proper notice under the DTPA. The defendant in that case maintained that the court could not sustain the judgment in favor of the plaintiff on his DTPA cause of action because the plaintiff failed to plead and prove the requisite notice. Consistent with the opinion in *Silva*, the court held that the defendant's failure to specially except to the plaintiff's pleadings constituted a waiver of the pleading defect.⁷¹ The defendant had also waived any objection to the plaintiff's failure to prove the requisite notice. The court held that in order to contest a party's right to maintain suit under the DTPA, the defendant must file a plea in abatement.⁷² If the plaintiff has not given the requisite notice, the court must abate the suit for thirty days. Since the defendant in *Pool Co.* failed to seek an abatement of the action, the defendant waived any right to complain on appeal regarding the lack of notice.

In *Sunshine Datsun, Inc v. Ramsey*⁷³ the defendant's pleading properly raised the deficiency of the plaintiff's notice, and the court concurred that the notice given, which failed to include a statement of the actual damages and attorney's fees being sought, was inadequate.⁷⁴ Nevertheless, the court refused to render a take-nothing judgment based on the consumer's noncompliance with the notice provision. Instead, the court held that the trial court should have merely abated the suit for the statutory period.⁷⁵ To effect this result after judgment the court remanded the case to the trial court with orders to abate the suit for a period of time, not to exceed thirty days, during which, as a condition to litigating her claims, the plaintiff was required to give the statutory notice.⁷⁶

C. Substantive Violations

The DTPA authorizes a consumer to maintain an action if any breach of an express or implied warranty has been a producing cause of actual damages sustained by the consumer.⁷⁷ The Texas Supreme Court in *Evans v. J.*

67. *Id.*

68. *Id.*

69. See Tex. R. Civ. P. 90 (defects in form or substance of a pleading not specifically pointed out by exception and brought to the attention of the court deemed to have been waived).

70. 681 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1984, no writ).

71. *Id.* at 219.

72. *Id.*

73. 680 S.W.2d 652 (Tex. App.—Amarillo 1984, no writ).

74. *Id.* at 654.

75. *Id.* at 655.

76. *Id.* If the court in this case had applied the same reasoning that was applied in *Pool Co.*, the court could have ruled that by failing to file a plea in abatement the defendant waived the complaint regarding lack of notice.

77. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1986).

*Stiles, Inc.*⁷⁸ expanded the implied warranties that arise in a case involving a sale of a newly constructed residence. The plaintiff in *Evans* recovered a judgment for breach of an implied warranty based on jury findings that the defendant did not construct the house in a good and workmanlike manner. The jury, however, refused to find the house not suitable for human habitation. The court of appeals reversed the trial court's judgment, holding that there could be no breach of an implied warranty in the sale of a new home absent a finding of uninhabitability.⁷⁹ In reversing the judgment of the court of appeals and affirming that of the trial court, the supreme court held that a builder-vendor impliedly warrants that a building constructed for residential use is constructed in a good and workmanlike manner *and* is suitable for human habitation.⁸⁰ Since the implied warranty of construction in a good and workmanlike manner is totally independent of the implied warranty of habitability, the court found the violation of the first warranty sufficient to support a DTPA judgment in favor of the plaintiff.⁸¹

In *Thrall v. Renno*⁸² the court held that the defendants who agreed to install a brick patio for the plaintiff impliedly warranted performance of the work in a good and workmanlike manner.⁸³ As a result, the jury's finding that the defendant failed to install the patio in a good and workmanlike manner, which was a producing cause of damages to the plaintiff, was sufficient to support a judgment under the DTPA.⁸⁴

Determining whether a party's conduct constitutes a breach of warranty as opposed to mere negligence or a breach of contract often poses difficulty. In a case decided during last year's survey period,⁸⁵ the Texas Supreme Court noted that the DTPA does not define the term warranty nor does it create any warranties.⁸⁶ Consequently, any warranty must be established independently of the DTPA. Ordinarily, implied warranties are derived from statute.⁸⁷ In *American Petrofina, Inc. v. PPG Industries, Inc.*⁸⁸ the plaintiff brought a DTPA action, alleging that the defendant failed to deliver diesel oil that the plaintiff had purchased. The plaintiff claimed that the contractual provision requiring delivery created an express warranty, or alternatively, that an implied warranty of delivery arose under the Uniform Commercial Code. The court held that the contractual obligation did not

78. 689 S.W.2d 399 (Tex. 1985).

79. *J. Stiles, Inc. v. Evans*, 683 S.W.2d 481, 483-84 (Tex. App.—Dallas 1985).

80. 689 S.W.2d at 400; *see Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (builder-vendor impliedly warrants home to be constructed in good workmanlike manner suitable for habitation).

81. 689 S.W.2d at 400. Although the court held that two separate warranties arise in the sale of a new home, the first warranty will subsume the second. A home constructed in a good and workmanlike manner and yet uninhabitable defies imagination.

82. 695 S.W.2d 84 (Tex. App.—San Antonio 1985, no writ).

83. *Id.* at 87.

84. *Id.*

85. *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558 (Tex. 1984); *see Hughes & Gavin, 1985 Annual Survey*, *supra* note 50, at 138.

86. 673 S.W.2d at 565.

87. *Id.*

88. 679 S.W.2d 740 (Tex. App.—Fort Worth 1984, writ *dism'd* by *agr.*).

rise to the level of an express warranty and further held that the Uniform Commercial Code does not contain any provisions recognizing an implied warranty of delivery.⁸⁹ Since the court found no breach of any express or implied warranty, the plaintiff did not prevail in its DTPA claim and was relegated to its remedies for breach of contract.

The court in *David McDavid Pontiac, Inc. v. Nix*⁹⁰ reached a contrary result under very similar facts. The *McDavid* court affirmed the jury's findings that the defendant had breached an express warranty when it failed to deliver a 1979 Pontiac Bonneville with a specific set of optional equipment.⁹¹ This oral agreement to deliver the described automobile should not have created any express warranty, just as the written agreement to deliver diesel oil did not create an express warranty in *American Petrofina*. Instead, the court should have found the failure to deliver the goods as agreed upon actionable solely as a breach of contract.⁹²

The DTPA also allows a consumer to maintain an action when any unconscionable action or course of action by any person has been a producing cause of actual damages.⁹³ Unconscionable action or course of action includes acts or practices that take advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree, as well as acts that result in a gross disparity between the value received and consideration paid in a transaction involving transfer of consideration.⁹⁴ In *Chastain v. Koonce*⁹⁵ the Texas Supreme Court established guidelines for determining whether a plaintiff has established the former type of unconscionable conduct. The court concluded that in order to show that he has been taken advantage of to a grossly unfair degree, a consumer need not show that the defendant acted intentionally or knowingly to bring about the resulting loss. Instead, the plaintiff need only show that the unfairness of the transaction was glaringly noticeable, flagrant, complete, and unmitigated.⁹⁶

The court in *Mytel International, Inc. v. Turbo Refrigerating Co.*⁹⁷ addressed the second form of unconscionable conduct. The defendant in that

89. The plaintiff sought to rely upon TEX. BUS. & COM. CODE ANN. § 2.312 (Vernon 1968), which creates a warranty in a contract for the sale of goods that the goods shall be delivered free from any security interest unknown to the buyer. The court held that this did not create an implied warranty of delivery in the broad sense, but merely warranted that when the contracting party delivered the goods they would be free from any previously unknown security interest. 679 S.W.2d at 749.

90. 681 S.W.2d 831 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

91. *Id.* at 835.

92. The court also based the judgment on the alternative finding that the defendant had represented to the plaintiff that the car the defendant was to deliver to her would have characteristics or benefits that the car did not have as delivered. This finding, which is a violation of TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 1986), sufficed to support the judgment in favor of the plaintiff independently of the claim for breach of an express warranty. 681 S.W.2d at 835.

93. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1986).

94. *Id.* § 17.45(5).

95. 29 Tex. Sup. Ct. J. 79 (Nov. 27, 1985).

96. *Id.* at 82. Due to the lack of any evidence that the transaction fit this description, the court affirmed the appellate court's reversal of a judgment in favor of the plaintiff. *Id.*

97. 689 S.W.2d 315 (Tex. App.—Fort Worth 1985, no writ).

case sold office supplies to the plaintiff pursuant to a scheme whereby the plaintiff's purchasing officer received illegal kickbacks. The jury found that the reasonable value of the goods purchased was \$5,266.26, whereas the purchase price was \$11,634.64. The court held this difference between the amount paid and the value received sufficient to constitute a "gross disparity" within the meaning of the DTPA.⁹⁸

Various provisions of the DTPA render misrepresentations in a consumer transaction actionable.⁹⁹ In a case of far-reaching significance the Texas Supreme Court in *Weitzel v. Barnes*¹⁰⁰ held that a plaintiff need not show reliance upon a misrepresentation in order to prevail in a DTPA action.¹⁰¹ The plaintiffs in *Weitzel* purchased a remodeled home from the defendant. After signing the contract to purchase the home, but before closing, the plaintiffs attempted to move into the house and discovered a "condemned" notice nailed on it. Although the contract gave the plaintiffs the right to inspect the house and terminate the contract if necessary repairs exceeded \$1,000, the plaintiffs elected not to pursue this right. Instead, they moved into the house and called the city to discuss the matter. Failing to receive information from the city, the plaintiffs called the defendant, who advised them that the house met the city code standards. The supreme court held that the plaintiffs should prevail in their DTPA suit upon establishing that the defendant's representations were false, without establishing that they purchased the home in reliance upon those misrepresentations.¹⁰²

In a sharply worded dissent, Justice Gonzalez queried how a misrepresentation could be a producing cause of a consumer's actual damages if the consumer did not rely on the misrepresentation. In short, he would have held the reliance requirement implicit within the need to establish producing cause. Since the plaintiffs failed to establish that they purchased the house in reliance upon the alleged misrepresentation, Justice Gonzalez would have held that plaintiffs did not present evidence of producing cause, and he accordingly would have rendered judgment that the plaintiffs take nothing.¹⁰³

The court of appeals in *McCrea v. Cubilla Condominium Corp.*¹⁰⁴ addressed a very similar question to that considered in *Weitzel*, although under

98. *Id.* at 318.

99. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 1986) (representing that goods or services have characteristics that they do not have); *id.* § 17.46(b)(6) (representing goods as original or new if used); *id.* § 17.46(b)(7) (representing goods as of a particular standard, quality, or grade if they are of another); *id.* § 17.46(b)(12) (representing that agreement confers or involves rights which it does not have or involve).

100. 691 S.W.2d 598 (Tex. 1985).

101. *Id.* at 600.

102. In reaching this conclusion, the court relied upon the fact that the 1979 amendments to the DTPA initially provided that a consumer could maintain an action if he sustained actual damages as a result of reliance on any of certain enumerated acts. The legislature changed this language to the present language, which allows the plaintiff to maintain an action upon proof of a deceptive act that has been a producing cause of actual damages. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1986). The court concluded that this change amounted to a rejection of reliance as an element of recovery. 691 S.W.2d at 600.

103. 691 S.W.2d at 603.

104. 685 S.W.2d 755 (Tex. App.—Houston [1st Dist.] 1985, no writ).

the rubric of materiality as opposed to reliance. The plaintiff in *McCrea* complained that the roof of a condominium unit purchased from the defendant leaked. He claimed that the defendant had misrepresented the age of the roof by one year. The court held that the misrepresentation had to be material for the plaintiff to recover.¹⁰⁵ The court defined a material fact as one that causes a party to enter into the transaction. By using this definition, the court actually required a showing of reliance, a requirement that the supreme court has now rejected.¹⁰⁶

The DTPA also allows a consumer to maintain a cause of action based upon a defendant's failure to disclose information concerning goods or services known to the defendant at the time of the transaction, but only if the failure to disclose was intended to, and actually did, induce the consumer to enter into the transaction.¹⁰⁷ In *First City Mortgage Co. v. Gillis*¹⁰⁸ the court held that as a matter of law the defendant did not have to disclose the fact that the written contract entered into by the plaintiff differed from the terms that the plaintiff had requested.¹⁰⁹ The court stated, "It is well settled that the parties to a contract have an obligation to protect themselves by reading what they sign. Unless there is some basis for finding fraud, the parties may not excuse themselves from the consequences of failing to meet that obligation."¹¹⁰

Courts still have difficulty in determining under what circumstances parties can maintain a DTPA action on the theory that the defendant represented that an agreement conferred or involved rights that the agreement did not involve.¹¹¹ In *William P. Terrell, Inc. v. Miller*¹¹² the plaintiff-purchaser brought suit against the defendant-seller, alleging that the defendant had agreed to pay \$1,600 toward the points charged by the lender, but refused to do so. The defendant maintained that the plaintiff's claim alleged breach of contract and not a DTPA violation. The court, without analysis, concluded that the failure to pay the points was a violation of section 17.46(b)(12).¹¹³

105. *Id.* at 759 (citing *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980)).

106. The court held that plaintiff presented no evidence to link the age of the roof to the leaks. Consequently, the court found no evidence that the misrepresentation was a producing cause of the plaintiff's loss. Under the court's definition of materiality, the plaintiff in *McCrea* would also have to have established that the misrepresentations made regarding the age of the roof induced him to purchase the condominium in the first place. 685 S.W.2d at 759.

107. TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (Vernon Supp. 1986).

108. 694 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

109. *Id.* at 146. The plaintiff in *Gillis* hired the defendant as a broker to obtain permanent financing for a manufacturing plant. In completing the standard application for financing the plaintiff made a request to vary the loan amortization and prepayment provisions contained in the application. The loan commitment did not incorporate these requested changes, and the defendant broker did not disclose this fact to the plaintiff.

110. *Id.* at 147.

111. TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon Supp. 1986); see *Hughes & Gavin*, 1985 *Annual Survey*, *supra* note 50, at 136-37.

112. 697 S.W.2d 454 (Tex. App.—Beaumont 1985, no writ).

113. *Id.* at 457. The court's erroneous conclusion would turn every breach of contract case into a DTPA claim. Any time a party fails to perform a contractual obligation, the opposing party could claim that the agreement did not contain the rights that the parties anticipated. See *Hughes & Gavin*, 1985 *Annual Survey*, *supra* note 50, at 136-37.

D. Actions Against Insurance Companies

When determining whether a plaintiff may maintain a DTPA action against an insurance company, one cannot consider the DTPA in a vacuum. Instead, a consideration of the interaction of the DTPA with the appropriate provisions of the Insurance Code is required. Under article 21.21 of the Insurance Code,¹¹⁴ any person who sustains actual damages as a result of any practice defined by section 17.46 of the DTPA as an unlawful deceptive trade practice may maintain an action against the insurance company that engaged in such practice. Although the relief available under article 21.21 nearly mirrors that provided under the DTPA,¹¹⁵ the case of *Allstate Insurance Co. v. Kelly*¹¹⁶ points out other advantages to pursuing an article 21.21 claim. The court noted that section 16 of article 21.21 allows a party to seek recovery from an insurance company engaging in any false, misleading, or deceptive acts or practices, regardless of whether the DTPA specifically enumerates those acts.¹¹⁷ Consequently, the types of conduct that may give rise to a claim for treble damages expand when the defendant is an insurance company.

In *Allstate* the plaintiff challenged the defendant insurance company's failure to accept a settlement proposal within the insured's policy limits. A previous case involving an automobile accident had named Alves, the insured, a defendant under circumstances that clearly established his liability. The plaintiff in that case had offered to settle the case for \$50,000, the amount of Alves' insurance coverage. When the insurance company refused to settle, the plaintiff pursued the case to a judgment in excess of \$500,000. As a result, Alves¹¹⁸ pursued a *Stowers*¹¹⁹ action for the insurance company's negligent failure to accept the settlement proposal. In addition, the plaintiff alleged a violation of article 21.21 of the Insurance Code. It was undisputed that the defendant insurance company knew that the claim against its insured presented serious exposure. Nevertheless, the company's

114. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1986).

115. *Id.* § 16(b) (providing for actual damages, court costs, attorneys' fees, plus additional damages of up to two times the actual damages if defendant acted knowingly; only difference from DTPA is failure to include mandatory trebling of first \$1,000 damages).

116. 680 S.W.2d 595 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

117. *Id.* at 605. Prior to the 1979 amendments of the DTPA, a consumer could maintain an action against any person who engaged in any false, misleading, or deceptive acts or practices. Under the 1979 amendments, however, a consumer can maintain a private action for relief only if the defendant engaged in one of the twenty-three acts specifically prohibited by § 17.46(b) of the DTPA, commonly referred to as the "laundry list." See Deceptive Trade Practices Act, ch. 603, § 4, 1979 Tex. Gen. Laws 603. In holding that § 16 of article 21.21 allows for actions against insurance companies for deceptive acts not contained in the "laundry list," the *Allstate* court disapproved of the contrary statement set forth in *Mobile County Ins. Co. v. Jewell*, 555 S.W.2d 905 (Tex. Civ. App.—El Paso 1977), writ ref'd n.r.e. per curiam, 566 S.W.2d 295 (Tex. 1978). 680 S.W.2d at 605.

118. Alves assigned two-thirds of his claim to Kelly, the plaintiff in the lawsuit in which the court awarded the \$500,000 judgment.

119. *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm'n. App. 1929, holding approved). A *Stowers* action arises when a plaintiff sues his insurer for the insurer's failure to settle a lawsuit against the plaintiff for an amount within the limits of the plaintiff's insurance policy.

representatives failed to inform Alves of their evaluation of the plaintiff's claim, of her offer to settle within policy limits, or of the risk to Alves if he did not accept the offer of settlement. The jury found that this failure to inform constituted an unconscionable course of action and was a false, misleading, and deceptive practice, which proximately caused the entry of the judgment against Alves. Based on these findings the court entered judgment against the company for actual damages of \$582,413.12, representing the amount of the judgment in the case against Alves along with post-judgment interest accrued as of the time of the DTPA suit, and \$1,164,826.24 as additional damages.¹²⁰

Allstate cited *Rosell v. Farmers Texas County Mutual Insurance Co.*¹²¹ for the proposition that the DTPA does not confer a cause of action in a *Stowers* case.¹²² The court rejected the reasoning of the court in *Rosell*, holding that a plaintiff can maintain a *Stowers* action under the DTPA if the jury finds that the insurance company's conduct constituted false, misleading, or deceptive acts or practices, as required by section 17.46(a) of the DTPA.¹²³ The *Kelly* decision allows a plaintiff great latitude in alleging potentially false, misleading, or deceptive acts in a suit against an insurance company under article 21.21 of the Insurance Code.

*Texas Farm Bureau Mutual Insurance Co. v. Vail*¹²⁴ presented an issue in many ways the converse of the issue considered in the *Kelly* case.¹²⁵ DTPA section 17.50¹²⁶ authorizes a consumer to maintain a DTPA action where the use or employment by any person of an act or practice in violation of rules or regulations issued by the State Board of Insurance under article 21.21 of the Texas Insurance Code constitutes a producing cause of actual damages. The plaintiff in *Vail* attempted to bring a DTPA action based on alleged unfair claim settlement practices engaged in by the defendant. The plaintiff contended that section 4(a) of the regulations promulgated by the State Board of Insurance required an insurance company to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability is reasonably clear. Relying upon section 17.50(a)(4),¹²⁷ the plaintiff filed an action under the DTPA based on a violation of this regulation. The court rejected this argument, holding that the regulation originated under article 21.21-2 of the Texas Insurance Code,¹²⁸ which does not confer a private right for unfair claim settlement practices.¹²⁹ Instead, that article only authorizes the State Board of Insurance to stop such unlawful practices by

120. 680 S.W.2d at 598-99.

121. 642 S.W.2d 278 (Tex. App.—Texarkana 1982, no writ).

122. 680 S.W.2d at 602.

123. *Id.* at 603; see TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1986).

124. 695 S.W.2d 692 (Tex. App.—Dallas 1985, no writ).

125. In *Kelly* the plaintiff sought to maintain an action under the Insurance Code for a violation of the DTPA, whereas in *Vail* the plaintiff sought to maintain an action under the DTPA for a violation of insurance rules and regulations.

126. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon Supp. 1986).

127. *Id.*

128. TEX. INS. CODE ANN. § 21.21-2 (Vernon 1981).

129. 695 S.W.2d at 694.

issuing a cease and desist order.¹³⁰ Since no private cause of action was available under that article, the court refused to allow the plaintiff to "back-door" his way into a private cause of action by relying upon regulations that merely restated the statutory provisions. As a result, the court reversed the judgment in favor of the plaintiff awarding damages under the DTPA and reformed the judgment to award only damages for breach of contract.¹³¹

E. Defenses and the Anti-Waiver Provision

In *Weitzel v. Barnes*¹³² the plaintiff entered into a contract to purchase a remodeled home from the defendant. The plaintiff maintained that the defendant made certain oral misrepresentations, and the defendant asserted the parol evidence rule as a defense.¹³³ The Texas Supreme Court rejected this defense, holding misrepresentations actionable under the DTPA regardless of whether they conflict with the parties' written agreement.¹³⁴ The court noted that the parol evidence rule only prohibits parties from relying upon inconsistent oral representations in support of a breach of contract claim.¹³⁵ Since the remedies provided under the DTPA are expressly cumulative with other available remedies,¹³⁶ such as the remedies provided for breach of contract, the oral misrepresentations could constitute the basis of a DTPA cause of action even though they did not support a contract claim.¹³⁷

In several cases decided during the survey period defendants sought to rely upon contractual provisions limiting the remedies available to the plaintiff or waiving entirely any express or implied warranties in the transaction. The plaintiffs in those cases responded by citing section 17.42,¹³⁸ which provides that a consumer's waiver of the DTPA provisions is unenforceable and void.¹³⁹ In *McCrea v. Cubilla Condominium Corp.*¹⁴⁰ the plaintiff brought suit under the DTPA, alleging defects in a condominium purchased from the defendant. The defendant relied upon a contractual provision disclaiming all express and implied warranties. The court rejected the plaintiff's argument that the disclaimer was unenforceable due to the provisions of section 17.42, citing *G-W-L, Inc. v. Robichaux*,¹⁴¹ a DTPA case in which the

130. See *Lone Star Life Ins. Co. v. Griffin*, 574 S.W.2d 576, 580-81 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.); TEX. INS. CODE ANN. § 21.21-2 (Vernon 1981).

131. 695 S.W.2d at 695.

132. 691 S.W.2d 598 (Tex. 1985).

133. The parol evidence rule operates in some situations to forbid a party from offering evidence of prior or contemporaneous oral agreements to contradict or vary the terms of a written contract. *Distributors Inventory Co. v. Patton*, 130 Tex. 449, 451-52, 110 S.W.2d 47, 48 (1937).

134. 691 S.W.2d at 600.

135. *Id.*

136. TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1986).

137. *Weitzel*, 691 S.W.2d at 599-600.

138. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1986).

139. Section 17.42 allows for waivers in cases involving a business consumer with assets of \$5 million or more and sufficient knowledge and experience to enable it to evaluate the merits and risks of a transaction, provided that the business consumer does not appear in a significantly disparate bargaining position. *Id.*

140. 685 S.W.2d 755 (Tex. App.—Houston [1st Dist.] 1985, no writ).

141. 643 S.W.2d 392 (Tex. 1982).

supreme court enforced a disclaimer of implied warranties. The court in *McCrea* concluded that "when a contract specifically states that no express or implied warranties are made, a cause of action for breach of express or implied warranties under either the DTPA or contract law has been waived, unless such provisions are against public policy or some other statutory provision."¹⁴²

In *Reliance Universal, Inc. v. Sparks Industries, Inc.*¹⁴³ the court noted that a contractual limitation on the amount of damages recoverable¹⁴⁴ would arguably be enforceable in either a breach of contract case or a DTPA breach of warranty case.¹⁴⁵ The provisions of section 17.42 do render the limitation unenforceable as regards a misrepresentation claim under the DTPA, however.¹⁴⁶

In *Martin v. Lou Poliquin Enterprises, Inc.*¹⁴⁷ the court questioned the use of the *Robichaux* opinion as authority. The court noted that in *Robichaux* the supreme court did not discuss the anti-waiver provision of the DTPA. Consequently, the court deemed the opinion not controlling and held that section 17.42 would nullify a limitation of liability clause or any other clause amounting to a waiver of the DTPA's protections.¹⁴⁸ The *Martin* opinion does not indicate whether the plaintiff pursued a claim for alleged misrepresentations or for breach of express or implied warranties. Whether the *Martin* opinion conflicts with the approach taken in *Reliance* is, consequently, unclear.

Finally, in *Hycel, Inc. v. Wittstruck*¹⁴⁹ the plaintiff alleged that the defendant had misrepresented the characteristics, uses, or benefits of the equipment that the plaintiff purchased. The plaintiff relied upon statements contained in a brochure. The defendant argued that the plaintiff could not maintain an action based on any misrepresentation in the brochure because it expressly stated that the specifications contained therein were merely the latest information available and because the defendant reserved the right to make any changes at any time. The court held that to allow the defendants to rely upon this provision as a defense to the plaintiff's DTPA action would be tantamount to enforcing a contractual provision waiving the remedies provided under the DTPA.¹⁵⁰ Relying upon section 17.42, the court refused to give effect to this disclaimer.¹⁵¹ For the same reason the court also refused to enforce contractual provisions limiting the remedies available to the plain-

142. 685 S.W.2d at 758; see also *Ellmer v. Delaware Mini-Computer Systems, Inc.*, 665 S.W.2d 158 (Tex. App.—Dallas 1983, no writ) (court rejected plaintiff's contention that DTPA renders any disclaimer of remedies unenforceable and void).

143. 688 S.W.2d 890 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

144. See TEX. BUS. & COM. CODE ANN. § 2.719 (Vernon 1968).

145. 688 S.W.2d at 892-93.

146. *Id.*

147. 696 S.W.2d 180 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

148. *Id.* at 186.

149. 690 S.W.2d 914 (Tex. App.—Waco 1985, no writ).

150. *Id.* at 923.

151. *Id.*

tiff and purporting to set a liquidated damage figure.¹⁵²

F. Relief Available Under the DTPA

In *Leyendecker & Associates, Inc. v. Wechter*¹⁵³ the Texas Supreme Court analyzed the potential damages recoverable by a plaintiff who prevails in a DTPA cause of action. The plaintiff in that case purchased a townhouse from the defendant and alleged that the defendant had misrepresented the size of the townhouse lot. The court noted that common law allows an injured party to recover actual damages measured by the difference between the value of that with which he has parted and the value of that which he has received, more commonly referred to as the out-of-pocket measure of damages.¹⁵⁴ Under certain circumstances Texas courts have allowed a party to recover the benefit of his bargain, which allows the plaintiff to recover the difference between the value of the good purchased as represented and the value as received.¹⁵⁵ In keeping with an earlier decision of the Waco court of appeals,¹⁵⁶ the court held that a plaintiff under the DTPA may recover either out-of-pocket damages or benefit-of-the-bargain damages, whichever gives the consumer the greater recovery.¹⁵⁷

In *David McDavid Pontiac, Inc. v. Nix*¹⁵⁸ the plaintiff sought rescission under the DTPA. The plaintiff purchased an automobile that did not have all of the equipment that the defendant represented it would have. The court held that before the plaintiff could avail herself of the right of rescission, she must offer to return the property she had received and the value of any benefit derived from its possession.¹⁵⁹ Since the plaintiff had driven the automobile for one month, travelling some 1,200 miles, the court held that she could only obtain rescission if she offered to pay to the defendant the value of the use of the automobile for this period. Since the plaintiff made no such offer, she could not receive rescission.¹⁶⁰ The plaintiff in *Nix* also sought injunctive relief under section 17.50(b)(2) of the DTPA.¹⁶¹ The court deemed the grant of injunctive relief to a prevailing consumer as discretionary with the trial court.¹⁶² Furthermore, absent evidence that the acts sought to be enjoined were occurring or were likely to occur to other

152. *Id.* at 923-24.

153. 683 S.W.2d 369 (Tex. 1984).

154. *Id.* at 373.

155. *Id.*

156. *Johnson v. Willis*, 596 S.W.2d 256, 262 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.).

157. 683 S.W.2d at 373; *see also* *Cheek v. Zalta*, 693 S.W.2d 632 (Tex. App.—Houston [14th Dist.] 1985, no writ) (court of appeals approved of trial court's use of "benefit of the bargain" measure of damages); *Lone Star Ford, Inc. v. McGlashan*, 681 S.W.2d 720 (Tex. App.—Houston [1st Dist.] 1984, no writ) (benefit of the bargain measure approved, and court held that purchase price was evidence of the market value of the good if it had been as represented).

158. 681 S.W.2d 831 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

159. *Id.* at 836.

160. *Id.*

161. TEX. BUS. & COM. CODE ANN. § 17.50(b)(2) (Vernon Supp. 1986) (consumer who prevails under DTPA may obtain order enjoining such acts or failure to act).

162. 681 S.W.2d at 839.

consumers, a permanent injunction forbidding those acts would be improper.¹⁶³ In *Kish v. Van Note*¹⁶⁴ the Texas Supreme Court described recovery under the DTPA as cumulative rather than mutually exclusive of other available remedies.¹⁶⁵ The court accordingly allowed the plaintiff to recover under both the DTPA and the Texas Consumer Credit Code.¹⁶⁶

The amount of additional damages recoverable under the DTPA was addressed by the supreme court in *Jim Walter Homes, Inc. v. Valencia*.¹⁶⁷ The DTPA states that a consumer who prevails under the DTPA may recover two times the portion of the actual damages not exceeding \$1,000, and if the trier of fact finds that the defendant committed the acts in question knowingly, the trier of fact may also award not more than three times the amount of actual damages in excess of \$1,000.¹⁶⁸ Prior to the supreme court's opinion in *Valencia*, lower courts differed as to whether this provision allowed a jury to award, as additional damages, three times the amount of the plaintiff's actual damages, which would result in quadrupling the plaintiff's recovery. The court in *Valencia* held that the maximum a plaintiff may recover is three times the actual damages sustained by the plaintiff.¹⁶⁹ Consequently, the trier of fact cannot award more than two times the amount of the plaintiff's actual damages as additional damages under the DTPA.¹⁷⁰

III. EMPLOYER-EMPLOYEE RELATIONS

During the survey period employers' rights with respect to the termination of employees-at-will continued to deteriorate. The enforcement of covenants restricting the post-employment activities of a former employee experienced a similar decline. Unfortunately for employers, no change in this trend appears likely.

Undoubtedly the most important decision in this area during the survey period, and probably the most widely discussed decision of the Texas Supreme Court in the last year, is *Sabine Pilot Service, Inc. v. Hauck*.¹⁷¹ In this case the plaintiff brought an action for wrongful discharge after the plaintiff's employer terminated his employment because he refused to perform an unlawful act.¹⁷² The court of appeals reversed a summary judgment

163. *Id.*

164. 692 S.W.2d 463 (Tex. 1985).

165. *Id.* at 467; see TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1986) (provisions of DTPA not exclusive, and remedies provided in subchapter are in addition to other remedies provided in other laws); *supra* text accompanying note 105.

166. 692 S.W.2d at 467; see TEX. REV. CIV. STAT. ANN. art. 5069-2.01 to .07 (Vernon 1971 & Supp. 1986).

167. 690 S.W.2d 239 (Tex. 1985).

168. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1986).

169. 690 S.W.2d at 241.

170. *Id.*; see also *Jasso v. Duron*, 681 S.W.2d 279 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (court examined legislative history of § 17.50(b)(1) and held that section does not allow for quadrupling of damages).

171. 687 S.W.2d 733 (Tex. 1985).

172. The plaintiff was a deckhand who had refused to pump the bilges into the water in a prohibited area.

in the employer's favor,¹⁷³ and the supreme court affirmed the reversal.¹⁷⁴ The court stated that public policy requires a "very narrow exception" to the employment-at-will doctrine.¹⁷⁵ The narrow exception covers "only the discharge of an employee for the sole reason that the employee refused to perform an illegal act."¹⁷⁶

Despite the effort of the supreme court to narrowly circumscribe its holding in *Sabine Pilot Service*,¹⁷⁷ now that the public policy exception has gained its toehold in the employment-at-will doctrine, it may prove difficult for the courts not to gradually expand the exception. For example, the public policy argument does not seem significantly stronger in *Sabine Pilot Service* than in *Maus v. National Living Centers, Inc.*¹⁷⁸ in which the defendant allegedly fired the plaintiff-nurse because she complained to her superiors about poor care and negligent treatment of patients in a nursing home.¹⁷⁹ Arguably, public policy should also have protected the plaintiff in *Currey v. Lone Star Steel Co.*,¹⁸⁰ who was terminated because he filed a lawsuit to recover monies the employer owed him. If the strict employment-at-will doctrine was a harsh rule at times, the doctrine at least offered certainty. A gradual case-by-case broadening of the exceptions to the doctrine is undesirable. The legislature should take action to consolidate the existing statutory exceptions¹⁸¹ to the doctrine and define the scope of any public policy exceptions.

The benefits employers may gain from restrictive covenants in an employment contract with their employees have also lessened in the past few years.¹⁸² Three cases decided by the Fifth Circuit during the survey period evidence the continuation of that trend. In *Tandy Brands, Inc. v. Harper*¹⁸³ the court refused to "red-line" an overly broad covenant where the only relief sought was damages for the breach of the covenant. In *NCH Corp. v. Share Corp.*¹⁸⁴ and *Hi-Line Electric Co. v. Dowco Electrical Products*¹⁸⁵ the court held that an employer does not have a cause of action against its for-

173. 672 S.W.2d 322, 324 (Tex. App.—Beaumont 1984); see Hughes & Gavin, 1985 *Annual Survey*, *supra* note 50, at 132-33.

174. 687 S.W.2d at 735.

175. *Id.*

176. *Id.*

177. *Id.*

178. 633 S.W.2d 674 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

179. See also *Jones v. Memorial Hosp. System*, 677 S.W.2d 221 (Tex. App.—Houston [1st Dist.] 1984, no writ) (nurse's critical article regarding patient treatment was constitutionally protected speech).

180. 676 S.W.2d 205 (Tex. App.—Fort Worth 1984, no writ).

181. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1967 & Supp. 1986) (discharge for filing worker's compensation claims); *id.* art. 5207a (Vernon 1986) (discharge based on union membership or nonmembership); *id.* art. 5765 (Vernon 1986) (discharge based on active duty in state military forces); *id.* art. 5765 (Vernon 1986) (discharge based on active duty in state military forces); *id.* art. 5207b (Vernon Supp. 1986) (discharge because of jury service); *id.* art. 5221k, § 1.02 (Vernon Supp. 1986) (discharge based upon discrimination).

182. See Hughes & Gavin, 1985 *Annual Survey*, *supra* note 50, at 130-32. But see *Gill v. Guy Chapman Co.*, 681 S.W.2d 264, 268 (Tex. App.—San Antonio 1984, no writ).

183. 760 F.2d 648, 653 (5th Cir. 1985).

184. 757 F.2d 1540, 1542 (5th Cir. 1985).

185. 765 F.2d 1359, 1363-64 (5th Cir. 1985).

mer employee's new employer for inducing a breach of the employee's restrictive covenant if the covenant is overly broad and, therefore, unenforceable against the employee.¹⁸⁶

IV. LIBEL

In an action for libel the long-held view has been that "the truth is an absolute defense."¹⁸⁷ Recent cases raise a question, however, as to whether truth is a defense or whether plaintiff has the burden of proving falsity as an essential element of his case. Three cases decided during the survey period illustrate the recent split of authority. In *Cranberg v. Consumers Union of U.S., Inc.*,¹⁸⁸ the Fifth Circuit assumed without substantial discussion that the plaintiff has the burden of proving the falsity of an allegedly libelous statement in order to recover.¹⁸⁹ In the very next sentence of the opinion, however, the court repeats the refrain that "substantial truth is a defense to a libel claim."¹⁹⁰ The court cited as authority cases that place the burden of proving the truth of the statement upon the defendant.¹⁹¹

Two Texas appellate decisions have directly faced the burden of proof issue and reached opposite conclusions. In *Outlet Co. v. International Security Group, Inc.*¹⁹² the court expressly held that the burden is on the plaintiff to prove the falsity of the statements rather than upon the defendant to prove their truth.¹⁹³ The court cited as authority *A.H. Belo Corp. v. Rayzor*.¹⁹⁴ Conversely, in *Frank B. Hall & Co. v. Buck*¹⁹⁵ the court held that truth of defamatory statements is an affirmative defense and the burden of proving truth by a preponderance of the evidence should rest upon the defendant.¹⁹⁶ The court considered and rejected *A.H. Belo Corp.*¹⁹⁷ and two earlier decisions¹⁹⁸ that seem to place the burden of proving falsity on the plaintiff. The court stated: "In our opinion the cases relied on by appellant do not support appellant's contention that Texas law has changed so as to now place on a private defamation plaintiff the burden of proving falsity of the defamatory statements in order to recover damages for libel and slander."¹⁹⁹ The Texas Supreme Court should resolve this split of authority at

186. The holding in *NCH Corp.* and *Hi-Line Electric* have ramifications beyond the employer-employee context. See *infra* text accompanying notes 227-30.

187. 36 TEX. JUR. 2D *Libel and Slander* § 52 (1962).

188. 756 F.2d 382 (5th Cir. 1985).

189. *Id.* at 390.

190. *Id.*

191. *Gulf Constr. Co. v. Mott*, 442 S.W.2d 778, 784 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); *Walker v. Globe News Publishing Co.*, 395 S.W.2d 686, 689 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

192. 693 S.W.2d 621 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

193. *Id.* at 627.

194. 644 S.W.2d 71, 80 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

195. 678 S.W.2d 612 (Tex. App.—Houston [14th Dist.] 1984, no writ).

196. *Id.* at 623.

197. 644 S.W.2d 71 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

198. *Borden, Inc. v. Wallace*, 570 S.W.2d 445 (Tex. Civ. App.—El Paso 1978, writ dismissed); *Roegelien Provision Co. v. Mayen*, 566 S.W.2d 1 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

199. 678 S.W.2d at 624.

the earliest opportunity.

Two decisions highlight a defendant's difficulty in obtaining summary judgment in a libel action in which actual malice is an issue. In *Beaumont Enterprise & Journal v. Smith*²⁰⁰ the plaintiff held public office and, therefore, had to show actual malice in his libel action against the defendant publisher. The trial court had granted summary judgment for the defendant, which the court of appeals reversed.²⁰¹ In affirming the reversal, the supreme court noted that for summary judgment purposes the burden rested on the defendant to show the absence of actual malice.²⁰² The defendant had submitted the author's affidavit as to her own state of mind with respect to the article's preparation. The court held, however, that an affidavit as to the affiant's own state of mind does not constitute evidence that will support a summary judgment.²⁰³ Two judges dissented, describing the record as "replete with evidence" that the author had not prepared the article with actual malice and noting that the record contained no evidence of actual malice.²⁰⁴ The Dallas court of appeals also reversed a summary judgment in *Goodman v. Gallerano*²⁰⁵ on the basis of the same reasoning. The court stated that the affidavits of the authors of the statement in issue constituted nothing more than uncontroverted testimony of interested witnesses and as such simply raised a fact issue as to the witnesses' credibility.²⁰⁶

The scope and application of absolute and qualified privileges continue to present fertile fields for judicial review. In the *Goodman* case discussed above the defendants made an allegedly defamatory statement to university officials who were charged with considering the plaintiff for tenure as a full professor. The defendants argued that the statements were absolutely privileged, but the court held that the process of reviewing for tenure does not fall within the "traditional areas" to which an absolute privilege applies.²⁰⁷ In *Levingston Shipbuilding Co. v. Inland West Corp.*²⁰⁸ the appellate court affirmed an award on the basis of the defendant's assertion of unsupportable claims in a lawsuit and subsequent distribution of the pleading to the news media. The court recognized the privileged nature of statements in the judicial process, but held that there are limitations upon this privilege and that the defendant by its actions had "stepped out of the umbrella of

200. 687 S.W.2d 729 (Tex. 1985).

201. 677 S.W.2d 176, 181 (Tex. Civ. App.—Beaumont 1984, no writ).

202. 687 S.W. 2d at 730.

203. *Id.* at 730-31.

204. *Id.* at 731 (Gonzalez, J., dissenting).

205. 695 S.W.2d 286 (Tex. App.—Dallas 1985, no writ).

206. *Id.* at 287-88.

207. *Id.* at 287; *cf.* *Astro Resources Corp. v. Ionics, Inc.*, 577 F. Supp. 446, 447-48 (S.D. Tex. 1983) (in Texas, an absolute privilege attaches to statements made in judicial or quasi-judicial proceedings); *Odeneal v. Wofford*, 668 S.W.2d 819, 820 (Tex. App.—Dallas 1984, writ *ref'd n.r.e.*) (absolute privilege attaches to statements made before the State Bar Grievance Committee). The courts in both cases held that the proceedings were quasi-judicial, and thus absolutely privileged, when the person to whom the statement was made had the authority to investigate the statement and make decisions based upon that investigation.

208. 688 S.W.2d 192 (Tex. App.—Beaumont 1985, no writ).

privilege."²⁰⁹

In *Marathon Oil Co. v. Salazar*²¹⁰ the court discussed the qualified privilege that attaches to statements by an employer about an employee to another person "having a corresponding interest or duty in the matter to which the communication relates"²¹¹ as well as the absolute privilege attaching to judicial proceedings. The plaintiff's employer had made a complaint to a justice of the peace in which the employer asserted that the plaintiff had stolen some of the employer's property. The court held such statements subject only to a qualified privilege; thus they may form the basis for liability if made with malice.²¹² The correctness of this holding seems doubtful. The court declined to follow the established rule that statements made in the course of a judicial proceeding are absolutely privileged. Instead, the court elected to follow the case of *Zarate v. Cortinas*,²¹³ which concluded that the "better reasoned rule" is that statements communicating a charge of committing a wrongful act should carry only a qualified privilege.²¹⁴ Strong policy considerations favor an absolute privilege upon such communications; nothing should chill the reporting of conduct believed unlawful. False reports maliciously made will give rise to a claim of malicious prosecution.

The Fifth Circuit applied a qualified privilege in *Seidenstein v. National Medical Enterprises, Inc.*²¹⁵ to the remarks of one doctor to a group of other physicians practicing in the same hospital regarding the reasons that the hospital had denied staff privileges to the plaintiff.²¹⁶ The court held such statements conditionally privileged as occurring "under circumstances wherein any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist which another, sharing that common interest, is entitled to know."²¹⁷ By reason of conditional privilege, the plaintiff was required to show actual malice. The appellate court reversed the jury finding of malice on the ground that the plaintiff offered no evidence that the speaker did not believe that the statement was true.²¹⁸

V. INTERFERENCE WITH CONTRACTUAL AND BUSINESS RELATIONS

As discussed in last year's survey article,²¹⁹ the development of the law with respect to this tort remains unclear, and the cases decided in the past year do little to help. Nevertheless, several cases merit attention. *State Na-*

209. *Id.* at 196-97. A question remains as to whether the court based the award upon the claim of libel or the claim of "abuse of process," which the plaintiff also asserted.

210. 682 S.W.2d 624 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

211. *Id.* at 630 (quoting *Bergman v. Oshman's Sporting Goods, Inc.*, 594 S.W.2d 814, 816 (Tex. Civ. App.—Tyler 1980, no writ)).

212. 682 S.W.2d at 631.

213. 553 S.W.2d 652 (Tex. Civ. App.—Corpus Christi 1977, no writ).

214. *Id.* at 655.

215. 769 F.2d 1100 (5th Cir. 1985).

216. The reasons were described as "of such a grave ethical and moral nature that they could not be disclosed." *Id.* at 1103.

217. *Id.* (quoting from cases cited therein).

218. *Id.* at 1105. Judge Williams wrote a vigorous dissent in support of the jury verdict. *Id.* at 1107.

219. Hughes & Gavin, 1985 *Annual Survey*, *supra* note 50, at 127.

*tional Bank v. Farah Manufacturing Co.*²²⁰ may prove particularly significant if followed or expanded by later decisions. In a complex fact situation, the plaintiff alleged that its lender banks had engaged in a series of improper actions that interfered with the internal business activities of the plaintiff corporation. The plaintiff broadly alleged a tort of interference. The court of appeals discussed the claim in the context of the tort of interference with contractual or business relations.²²¹ The defendant argued that the plaintiff showed no evidence of interference with an existing or reasonably probable future contract or business relation with a third party. Indeed, the plaintiff's complaint alleged that the lenders had interfered with its internal affairs—notably, its election of officers and directors.

The appellate court admitted that interference has traditionally involved the plaintiff's relations with third parties.²²² Nevertheless, the court held that the evidence sufficiently showed that the lenders had interfered without justification in plaintiff's "business relations, election of directors and officers and its protected rights."²²³ Accordingly, the court concluded that as a matter of law the plaintiff had established a cause of action for interference.²²⁴ The opinion in *State National Bank* was neither reasoned clearly nor did it correctly state the law. Nevertheless, the opinion remains,²²⁵ and a creative plaintiff may take advantage of the court's loose reasoning to craft a new or vastly expanded tort of interference with business relations in cases not involving contracts or relations with third parties but only the plaintiff's internal affairs.

Several cases presented the question of what type of contract the law protects from interference. As previously discussed²²⁶ the Fifth Circuit held in *NCH Corp. v. Share Corp.*,²²⁷ and *Hi-Line Electrical Products v. Dowco Electrical Products*,²²⁸ that no cause of action exists for interference with a contractual provision limiting an employee's post-employment activities if the court holds the provision overly broad and therefore unenforceable.²²⁹ The Fifth Circuit distinguished the issue from the instances in which the contract at issue may be unenforceable because of other reasons (such as the statute of frauds) on the grounds of the strong public policy that disfavors agreements that limit a person's right to employment.²³⁰ In *Deauville Corp. v. Federated Department Stores, Inc.*,²³¹ the Fifth Circuit also held that plaintiffs can maintain an action based on interference with an at-will contract.²³² Practi-

220. 678 S.W.2d 661 (Tex. App.—El Paso 1984, writ dism'd by agr.).

221. *Id.* at 688.

222. *Id.* at 690.

223. *Id.*

224. *Id.*

225. The parties settled during the pendency of the application for writ of error, so the appellate decision will stand.

226. See *supra* notes 184-85 and accompanying text.

227. 757 F.2d 1540 (5th Cir. 1985).

228. 765 F.2d 1359 (5th Cir. 1985).

229. *Id.* at 1362.

230. *Id.*

231. 756 F.2d 1183 (5th Cir. 1985).

232. *Id.* at 1195.

tioners should read the holding in *Deauville* with caution, however, given the holding of the same court in *C.E. Services, Inc. v. Control Data Corp.*²³³ There the court noted, "A third-party's efforts to induce another to exercise his right to dissolve a contract at will or to terminate contractual relations on notice does not constitute tortious interference with contract under Texas law."²³⁴ The court attempted unconvincingly to distinguish *Deauville*,²³⁵ but the two cases appear to conflict.

VI. MISCELLANEOUS

A. Texas "Lemon Law"

In *Chrysler Corp. v. Texas Motor Vehicle Commission*,²³⁶ the Fifth Circuit upheld the constitutionality of the Texas "lemon law."²³⁷ The statute grants to purchasers of automobiles certain administrative remedies against manufacturers before the Texas Motor Vehicle Commission.

B. Indemnity Agreements

Texas courts will enforce agreements by which one party agrees to indemnify another party for the loss caused by the negligence of the indemnified party only if the agreement is clear and unequivocal.²³⁸ For the careful draftsman, this means that the indemnification agreement should expressly state that the agreement protects the indemnified party from the consequences of his own negligence. The Fifth Circuit held in *Gulf Oil Corp. v. Burlington Northern Railroad*²³⁹ that the court will interpret a startlingly broad indemnification provision²⁴⁰ to protect the indemnified party from the loss caused by its own negligence.²⁴¹ Though the provision made no reference to whether the indemnified party could look to the agreement to recover for a loss occasioned by its own negligence, the court held that because the indemnitor agreed to be responsible for all losses "incident to" the activity in question, the indemnitor had fair notice that it could be liable for a loss resulting solely from the negligence of the opposite contracting party.²⁴² The

233. 759 F.2d 1241 (5th Cir. 1985).

234. *Id.* at 1248 (citing *Claus v. Gyorkey*, 674 F.2d 427, 435 (5th Cir. 1982); *Kingsberry v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.).

235. 759 F.2d at 1249 n.11.

236. 755 F.2d 1192 (5th Cir. 1985).

237. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1986).

238. See *Haywood v. Southwestern Elec. Power Co.*, 708 F.2d 163, 166 (5th Cir. 1983); *McClane v. Sun Oil Co.*, 634 F.2d 855, 858 (5th Cir.1981); *Chevron Oil Co. v. E.D. Walton Constr. Co.*, 517 F.2d 1119, 1121 (5th Cir. 1975); *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208, 211 (Tex. 1980); *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972); *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721, 723 (Tex. 1971).

239. 751 F.2d 746 (5th Cir. 1985).

240. "[Defendant] . . . hereby assumes all responsibility and liability for, and expressly covenants and agrees to protect, indemnify and save harmless [Plaintiff] from and against any and all loss . . . of or damage to property whatsoever, in any manner caused by, resulting from or incident to storage of private cars on said track" *Id.* at 747-48 (emphasis by the court).

241. *Id.* at 748.

242. *Id.* at 749.

Fifth Circuit gave the contractual provision a more generous reading than would have been given by a Texas court.

C. Conversion Remedy

In *Storms v. Reid*²⁴³ the defendant spent approximately \$18,000 on improvements to a house that he thought he had purchased but which in fact belonged to the plaintiff. When the plaintiff saw the improvements to the house he demanded that the defendant pay him for the house. The defendant refused and the plaintiff brought an action for conversion. The plaintiff prevailed on the conversion claim and elected to recover possession of the property rather than money damages. The trial court denied the election and limited the plaintiff to the recovery of the fair market value of the house at the time and place of the conversion (which was approximately \$1200). The court of appeals affirmed, holding that an equitable exception exists to the plaintiff's right to recover converted property if such recovery results in a windfall to the plaintiff.²⁴⁴ Hopefully, courts will limit the *Storms* decision to its facts.²⁴⁵ A broad application of the exception would remove a significant risk to a party who knowingly converts the property of another.

D. Duress

The extensive opinion of the El Paso appellate court in *State National Bank v. Farah Manufacturing Co.*²⁴⁶ contains a discussion of a broad array of tort claims, some previously mentioned.²⁴⁷ The opinion merits attention for its discussion of the duress claim that the plaintiff asserted against its lender banks. The court first defined duress as a recognizable tort for which a plaintiff may recover and not merely a defensive issue.²⁴⁸ The court found that the lending banks had used the threat of declaring the plaintiff's loan in default to prevent the election of a particular director.²⁴⁹ The court then proceeded systematically to reject each of the banks' arguments as to why the plaintiff did not prove the elements of duress.²⁵⁰ Finally, the court appeared to hold that the plaintiff was entitled to recover the same measure of damages, including lost profits, as would be recoverable for the fraud claims asserted by the plaintiff.²⁵¹ The court's opinion is highly fact-intensive, and the court's reasoning is far from clear or sound in many respects; nevertheless, counsel involved in commercial tort litigation will want to review this opinion.

243. 691 S.W.2d 73 (Tex. App.—Dallas 1984, no writ).

244. *Id.* at 75.

245. The court noted that the plaintiff had virtually abandoned the house for two years prior to discovering the improvements made by the defendant.

246. 678 S.W.2d 661 (Tex. App.—El Paso 1984, writ dismissed by agreement).

247. See text accompanying *supra* notes 220-25.

248. 678 S.W.2d at 685-86. The court cited *Housing Authority v. Hubbell*, 325 S.W.2d 880, 902 (Tex. Civ. App.—Dallas 1959, writ refused n.r.e.), as the only prior Texas case to discuss the point and as support for the conclusion that duress constitutes a tort.

249. 678 S.W.2d at 686.

250. *Id.*

251. *Id.* at 698.